No. 16345

United States
Court of Appeals
for the Ninth Circuit

GERMANA E. PRAIDO DEL CASTILLO,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT, BRIEF and ARGUMENT of APPELLANT

Appeal from the United States District Court for the District of Arizona

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(For the convenience of the Court, the essence of the discussion is summarized in a concise heading of each point in the argument, and the material broken down in compact sections and keyed with corresponding numerals. The ease and simplicity of presentation, therefore, does away with the necessity of a summary argument.)

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APENDIX

Attached **Transcript Page**

(Errata: TR—29, line 8, to read Exhibit E)

ATTORNEYS OF RECORD

JOSE DEL CASTILLO,
221 North Church,
Tucson, Arizona,
Attorney for Appellant

JACK D. H. HAYS,
United States Attorney,
204 United States Courthouse,
Phoenix, Arizona;

MARY ANNE REIMANN,
Assistant United States Attorney,
P. O. Box 1951,
Tucson, Arizona,

Attorneys for Appellees.

In the

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

No. 16345

STATEMENT, BRIEF and ARGUMENT

of APPELLANT

GERMANA E. PRAIDO DEL CASTILLO,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

REPORT OF OPINION BELOW

The district court delivered no written opinion or discussion of the case, but just made brief remarks to the effect: (on vacating order denying motion to dismiss and granting motion to dismiss), that statutory provision making valid filing of claim within 7 years provided no amending clause in enacting clause of Par. (5),§802 (d) (3) (B) 38 U.S.C.; (on further extension of the 6-years statute of limitation, Sec. 445, 38 USC, upon persons under legal disability) that there is no alleged fact of legal disability of plaintiff in the Amended Complaint.

JURISDICTION

Jurisdiction of the District Court was predicated upon the existence of final disagreement between Appellant-plaintiff and the Veterans' Administration on January 8, 1958. TR—22-23. 38 USC § 445, incorporated by reference in 38 USC § 817, makes the right to maintain a suit dependent upon a "disagreement" between Veterans' Administration and claimant and defines a "disagreement" as a denial of a claim by the Administrator, or someone acting for him on an appeal to the Administrator. 38 USC §445c, enacted for purpose of "clarifying" §445, enlarges the definition to include denial by Administrator, or review by Board of Veteran's Appeals.

The judgment of the District Court was entered on December 12, 1958. TR—40. Notice of appeal filed December 19, 1958. TR—41.

Jurisdiction of this Court is invoked under 28 USC §1291.

THE CONTESTED ISSUES

1. The questions here presented may conveniently be started with this simple problem:

The defendant moved the court to dismiss for lack of jurisdiction by reason of the statute of limitation and declared that its motion is based upon the facts set forth in the Amended Complaint. Plaintiff contended that, under the Rules of Civil Procedure, defendant's motion is considered as one for summary judgment and in effect represents that there exists no genuine issue of any material fact. Plaintiff further contended that defendant has thereby conceded the truth of *the facts set forth in the Amended*

Complaint, and plaintiff having moved, in a cross-motion, for summary judgment, in his favor, based upon the same facts defendant stated, the parties, therefore, are in agreement that there is not any fact on which an issue could be raised for further trial.

2. Whether the amended provision of paragraph (5), subsection 802 (d) (3) (B), 38 USC, under which claimant applied for the benefits of automatic gratuitous insurance, which makes valid a claim filed within seven (7) years after death of insured, operates as an exception, as to the matter of time, to the general provision of section 445, 38 USC, which provides that a suit shall be brought within six (6) years after accrual of the contingency for which the claim is made and further provides that the running of the statute of limitation shall be suspended for the period between the filing of the claim with the Veterans' Administration and its final denial when a "disagreement" is said to exist and when only then the court could take jurisdiction.

3. The case involves further the simple question whether the fact of plaintiff's legal disability by reason of her residence in the Philippines during the hostilities between the United States and Japan may not have been sufficiently pleaded and raised in the Amended Complaint which avers facts from which such residence could necessarily be drawn, and which further alleges formally that six years have not elapsed since accrual of the right for which claim is made in this action; whether such fact which the law may presume is properly before the court when defendant moved to dismiss for lack of jurisdiction because of the statute of limitation, basing

its motion upon the facts set forth in plaintiff's Amended Complaint; and whether plaintiff need have pleaded a presumption of law.

STATEMENT OF THE CASE

This is an appeal from a final judgment of the lower court dismissing an action upon a claim for automatic gratuitous insurance under the National Service Life Insurance brought by appellant-plaintiff as the last person to stand in locos parentis of one Priscillano Estil Praido, USSAFE, beleaguered and killed in Bataan, Philippines, on April 3, 1942. The date of serviceman's death is a presumption accepted by the Veterans' Administration upon affidavits supplied by comrades in arms, since the Armed Forces of the United States failed to furnish the next of kin with the required information.

Defendant government moved the court to dismiss the action "for the reason that this Court does not have jurisdiction in this matter and that plaintiff has failed to state a claim. This Motion is based on the Stipulation of Facts and facts as set forth in plaintiff's Amended Complaint therein, and upon the authorities set forth in the Memorandum attached thereto." TR—13.

Plaintiff, in a cross-motion and in opposition to the motion to dismiss, in turn, moved the court to enter a "summary judgment in her favor for the relief demanded as to the benefits for automatic gratuitous insurance under the National Service Life Insurance Act, on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law." TR—16. The motion is based on (a) stipulations of

facts between the parties and the facts as set forth in the Amended Complaint as defendant's basis for its motion to dismiss, and upon other matters referred to and affidavits attached thereto.

The facts are admitted. Plaintiff was the last person to stand in locos parentis to the deceased serviceman and at the time of his death was dependent upon him. "Plaintiff acquired such status when on or about 1933, while the serviceman was about 16 years old, the natural mother, a widow, was seriously afflicted with pulmonary tuberculosis and later with cancer until her death on or about November 17, 1943, and was so incapacitated to ever act as parent to the serviceman." TR—4.

At the time of the serviceman's death, a contract of automatic gratuitous insurance was in full force and effect in the sum of $5,000.00 as provided under subsection 802 (d) (3) (B), 38 U.S.C. Paragraph (5) of said subsection further provides in pertinent part, as follows: "Provided, That no application for insurance payments under subsection (d) (2) or (3) of this section, shall be valid unless filed with the Veterans' Administration within seven years after the date of death of insured by evidence satisfactory to the Administration . . ."

Plaintiff filed her claim with the Veterans' Administration on June 11, 1948. TR—14.

No administrative denial of plaintiff's claim for automatic gratuitous insurance benefits was communicated to her at her last address on record, nor anywhere else. At all times, plaintiff believed her claim was being processed, as she was assured by the Manila office of the Veterans' Administration

whenever she went in that office to make inquiries. TR—6, 7, 18.

On writing a letter to the Veterans' Administration in Washington, D.C., she was informed, in a reply letter dated July 31, 1956, that her claim for automatic gratuitous insurance payments was denied in a letter purported to have been written dated March 21, 1950, "for the reason that you were not the last person to stand in the position of mother to the serviceman prior to his entry into service." TR—21.

Said letter of March 21, 1950, was never delivered or communicated to her at her last address on record or anywhere else. This uncontroverted fact is admitted. Section 445d, 38 U.S.C., provides in pertinent part, as follows: "Provided, That on or after June 29, 1936, notice of denial of the claim under a contract of insurance by the Administrator of Veterans' Affairs or someone acting in his name shall be by registered mail directed to the claimant's last address of record: Provided further, That the term 'denial of claim" means the denial of the claim after consideration of its merits."

From the administrative letter of July 31, 1956, plaintiff appealed to the Administrator of Veterans' Affairs, upon VA Form 1-9, furnished by the Veterans' Administration for the purpose, filing her appeal on June 18, 1957. TR—6-7.

In a letter dated January 8, 1958, the Veterans' Administration informed plaintiff that the appeal she filed on June 18, 1957, may not be given consideration. TR—22-24, Exhibit B.

On February 24, 1958, appellant filed suit. On May 6, 1958, plaintiff filed her Amended Complaint, as of course. TR—3-9. The United State Attorney General was served with the Amended Complaint on May 6, 1958. TR—11.

Notwithstanding the fact that defendant has conceded the *facts as set forth* in Plaintiff's Amended Complaint, it opposed plaintiff's cross-motion for summary judgment for the reasons that "The attorney for the plaintiff herein states as a fact in his Motion that the plaintiff was the last person to stand in locos parentis to the deceased serviceman. If the Motion to Dismiss, filed by the Government, is denied this question is a genuine issue to a material fact which must be determined by the Court. Exhibit (A) and (B) attached to plaintiff's Motion plainly shows a dispute on this point. A Motion for Summary Judgment should, therefore, not be granted since a genuine issue of fact material to the dispute by the parties exists." TR—25.

Apparently, defendant's reference to "The attorney for the plaintiff herein states as a fact in his Motion that the plaintiff was the last person to stand in locos parentis to the deceased serviceman," must be referring to something to that effect in the attached exhibits A and B, TR—2-23, and not in the motion itself, TR—16-17.

At a hearing coming on regularly, on September 29, 1958, the court denied defendant's motion to dismiss, and also denied plaintiff's cross-motion for summary judgment.

On October 21, 1958, the court recalled the parties herein at a hearing and made these orders: vacated the order of September 29, 1958, denying defendant's

motion to dismiss, and granted defendant's motion to dismiss. The court remarked in effect that there is no amending clause in the enacting clause of paragraph (5), subsection 802 (d) (3) (B), 38 U.S.C., which would have amended the six-year limitation provided in section 445, 38 U.S.C.; and as to the further extension of the limitation period to persons under legal disability, the court in effect remarked that there was no such legal disability before the court.

Thereupon, plaintiff filed a motion for leave to file an amendment to the Amended Complaint and motion to alter or amend a judgment. Plaintiff sought to allege formally facts setting forth facts of plaintiff's legal disability by reason of her residence in the Philippines during the hostilities between the United States and Japan. The motion was based upon an affidavit, attached to the motion, executed by plaintiff in support thereof, as Exhibit E. TR—35-37.

Defendant opposed plaintiff's motions for the reason that "proposed Amended Complaint . . . would not cure the jurisdictional defect of the First Amended Complaint theretofore dismissed . . . in that the plaintiff's claim for gratuitous insurance benefits is barred by the limitation provisions of Title 38 U.S.C. 445, incorporated by refernece in Section 817 of the same Title." TR—38. The lower court denied plaintiff's motions. On December 12, 1958, the court directed hte Clerk to enter judgment that plaintiff take nothing by her Amended Complaint and the same be dismissed.

From the judgment and orders plaintiff appealed to this Court.

SPECIFICATION OF ERRORS

1. Where the defendant moved to dismiss the compalint, for lack of jurisdiction and of statement of a claim, submitted to the court specifically declaring that its motion is "based on the Stipulation of Facts and facts as set forth in plaintiff's Amended Complaint herein," the defendant has thereby expressly conceded the truth of all such facts so stated as stipulated and as set forth in the Amended Complaint, without qualification; and the court in passing upon the defendant's motion to dismiss and the plaintiff's cross-motion for summary judgment, should have accepted as true the facts so stipulated and the facts as set forth in the Amended Complaint, without qualification, and should have found that there existed no genuine issue of any material fact for further trial and should have construed the allegations of the pleading most favorably in a summary judgment in plaintiff's favor. The court in denying the plaintiff's motion for summary judgment, therefore, committed error.

(2) WHERE a claimant of automatic gratuitous insurance, under the National Service Life Insurance Act, could not sue the United States until a "disagreement" exists, and this required jurisdictional condition could exist only on Claimant's filing a claim with the Veterans' Administration and being rejected, the amended provision of Paragraph (5), subsection 802 (d) (3) (B), 38 USC, under which claimant applies which makes valid a claim filed within 7 years after the death of the insured, creates a cause of action on the filing and rejection of the claim and operates as an expressed exception, as to the matter of time, to the general provision of

section 445, 38 USC. And a claim filed June 11, 1948, for the automatic gratuitous insurance of the insured killed in Bataan on April 3, 1942, was therefore duly filed under the law as Congress so intended, giving effect to the suspension of the running of the statute of limitation for the period elapsed between the filing of plaintiff's claim with the Veterans' Administration and the final administrative denial of the claim on January 8, 1958; and suit filed in the District Court on February 24, 1958, is properly brought. The lower court in failing to find that the action was timely brought under the statutes committed error.

3. When the facts from which the law may presume the fact of the residence of the plaintiff in the Philippines during the period of hostilities between the United States and Japan are stated in other material allegations in the Amended Complaint, and it has been further alleged that six years has not passed since accrual of plaintiff's right of action; and defendant having moved the court to dismiss for lack of jurisdiction by reason of the statute of limitation and having based its motion on the facts as set forth in the Amended Complaint, the matter of plaintiff's legal disability which would have extended further the period of limitation in which claimant may file a claim by reason of such residence was sufficiently pleaded and raised as to satisfy the application of the statutory provision extending the period of limitation to such other person under legal disability. And the limitation having been suspended according to the statutory provision from the date of plaintiff filing her claim with the Veterans' Administration on June 11, 1948, to its final rejection

on January 8, 1958, the plaintiff having filed action on February 24, 1958, the court should have found that the suit was brought within the statutory limitation provisions; and in granting defendant's motion to dismiss, the court committed error.

If the questions presented in the CONTESTED ISSUES are not answered in favor of the appellant, the additional question raised in the Statement of Point in the Notice of Appeal will also be presented. These include whether (1) the court erred in denying plaintiff's motion for leave to file amended complaint on the ground stated and set forth to show the ultimate facts of legal disability stated therein and motion to alter or amend a judgment.

ARGUMENT

FIRST POINT

The defendant, in having submitted to the court and specifically declared that its motion to dismiss is "based on the Stipulation of Facts and facts as set forth in plaintiff's Amended Complaint herein," and the plaintiff, in joining by another pleading in the form of a cross-motion for summary judgment on the same basis of facts, have therefore appropriately placed the facts so stipulated and the facts as set forth *in plaintiff's Amended Complaint upon the record, and constituted thereby an admission by both parties of the truth of such facts as well as a mutual admission that there exists no genuine issue at all of any material fact that would have necessitated any further trial, but that the court, sitting without a jury, may apply the applicable rules of law on the facts so submitted. They, too, conveniently placed the*

questions of law in controversy before this Court for review.

(A) Preliminary considerations.

Ordinarily, motions to dismiss complaint admitted all facts well pleaded and all facts that could be reasonably inferred from the facts alleged.

Wooten vs. Wooten, C.C.A. N.M. 1945, 151 F. 2d, 147, 161 ALR 1027;

Fash vs. Clayton, D.C. N.M. 1948, 78 F. Supp. 359;

Inland Empire Dist. Council, etc., vs. Graham, D. C. Wash. 1943, 53 F. Supp. 369, appeal dismissed 142 F. 2d, 453.

"In passing upon the motions to dismiss and the cross-motions for summary judgment, the averments of the complaint must be accepted as facts," declared the Court in Iversen v. United States, 63 F. Supp. 1001, affirmed 66 S. Ct. 825, 327 U.S. 767, 90 L. ed. 998.

In this jurisdiction, the defendant herein, by moving to dismiss on the ground of jurisdiction by reason of the statute of limitation, has in effect admitted that there exists no genuine issue of any material fact. In Hartley Pen Co. v. Lindy Pen Co., Inc. (SD Calif. 1954) 20 FR. Serv. 24c.31, Case 2, 16 FRD 141, this Court says:

> "Although it has been decided that notwithstanding the provisions of Rule 8 (c) . . . the affirmative defense of bar of the statute may be raised by motion to dismiss pursuant to Rule 12 (b) (6) . . . in view of the nature of the defense the better practice is to raise the question by mo-

tion for summary judgment pursuant to Rule 56 (b)."

Other courts find this opinion to be sound. In Williams vs. United States, D. C. N. C., 1955, 134 F. Supp. 333, where the government moved to dismiss the action to recover on a National Service Life Insurance policy on the ground the six-year statute of limitation and correspondence was introduced by both parties in relation thereto, motion to dismiss would be considered as one for summary judgment.

Courts have repeatedly held: that a motion to dismiss upon the ground that the cause is barred by statute of limitation and by laches is a "speaking demurrer" and it is immaterial whether it is designated as a motion to dismiss or for summary judgment. Courts have recognized this expeditious methods of disposing off litigation since the adoption of the Federal Rules of Civil Procedure. Latta vs. Western Inv. Co. (C.C.A. 9th, 1949) 173 F. 2d 99, 12 F.R., cert. den. 337 U.S. 940, 69 S.Ct. 1516, 95 L.ed. 1744; Fauchier vs. McNeil Const. Co., 84 F. Supp. 574 (affidavits may be used).

It would not really matter what designation defendant placed on its motion; in any case, it has voluntarily adopted, specifying so, the facts set forth in the Amended Complaint as the basis of its motion. By doing so—

(B) Defendant's motion constitutes an admission that there is no dispute as to the facts set forth by plaintiff in her Amended Complaint; that it conceded the truth of such facts. This the defendant has done through regular pleadings and signed by counsels of the defendant. They could not have spread the

facts upon the record more conclusively than they have effected. Having done so, defendant could not have any reason, later, to evade or quibble about, as to any issue of fact which by its own voluntary and affirmative action it admitted in effect that it does not exist, and submitted, by pleading, to the court that it passes judgment in accordance with the law applicable to the stipulated facts and the facts set forth in plaintiff's Amended Complaint.

The plaintiff, in turn, in a cross-motion for summary judgment, based, for one, on the same stipulated facts and facts set forth in the Amended Complaint, jointly submitted the same stated facts to the court, and therefore mutually agreed with the defendant that there exists no genuine issue of any material fact for further trial, but the application of the rules of law upon the facts the parties mutually submitted for adjudication.

This is an inexpensive and expeditious manner of securing the decision of the court conveniently and without delay, as well as appropriately placing the questions of law in controversy before the appellate court for review. Suydam vs. Williamson, 20 How. (U.S.) 427, 15 L. ed. 978.

The correspondences from the Veterans' Administration, attached as Exhibits (A) and (B), TR—21-23, were introduced as evidence in support of plaintiff's cross-motion for summary judgment to prove the existence of "disagreement" which is the condition required for the court to take jurisdiction. The reference to Exhibit (A) and (B), TR—25, seemingly showing a dispute is of no moment. The defendant has all this time in its possession the plaintiff's appeal and the memorandum in support there-

to, together with supporting affidavits, submitted to the Board of Veterans Appeals which was not given consideration, TR—23, showing by fact and law that plaintiff just as alleged in the Amended Complaint was the last person to stand in locos parentis with the insured serviceman and was dependent upon him at the time he was killed by the Japs while fighting for the United States. Defendant has, therefore, knowledge of the facts and the law when it moved the court to dismiss and declared that it based its motion upon the facts set forth in the Amended Complaint, conceding affirmatively the truth of plaintiff's alleged facts. But even if defendant might have filed affidavits to deny such facts, the court should still be obliged to indulge the presumption that plaintiff might be able to prove them. But, as the case at bar is, the defendant admitted the facts it sought to breath in fire of dispute. We respectfully submit that the facts stipulated between the parties and the facts set forth in the Amended Complaint affirmativly adopted and conceded by defendant in its motion are conclusive upon defendant-appellee, and that summary judgment should have been granted plaintiff-appellant.

We confidently submit that the lower court clearly erred in denying plaintiff-appellant's cross-motion for a summary judgment on the ground that there is no genuine issue of material fact for further trial, since both parties admitted and submitted by pleadings the facts stipulated upon and stated in the amended complaint for the application by the court of the law applicable, and that under the law plaintiff-appellant is entitled to judgment, based upon the matters set forth therein (TR—16-17).

SECOND POINT

The amended provision of Paragraph (5) § 802 (d) (3) (B), 38 U.S.C., under which claimant applied, which makes a claim valid filed with the Veterans' Administration within seven (7) years after the death of the insured, where a claimant of automatic gratuitous insurance benefits could not sue the government until the claim is first filed with the Veterans' Administration and is rejected, (A) creates thereby a cause of action in favor of claimant dependent upon such disagreement (1) since a disagreement is a jurisdictional pre-requisite to the mantenance of a suit on the insurance policy benefits, (2) qualifying and stopping the six-year limitation provided in § 445 from operating so that claimant who is prevented, unless there exists a disagreement, from suing can have the full benefit of the time allowed her in which to bring her action, and (3) because Section 445 was intended to insure the application of the general rule of jurisdiction that administrative remedies must be exhausted before appeal is made to the courts; and, further, (B) operates as qualifying and supplying exception to the general rule of statute of limitation, where the general and the specific provisions are in apparent conflict, (1) since rules of statutory construction should give the effect contemplated by the legislature, one portion of a statute should not be construed to annul or destroy that has been clearly granted by another, but construed so that all may stand together.

And since the whole period during which the appellant's claim was held in the Veterans' Administration was suspended, appellant's action is not barred by the statute of limitation.

Preliminary considerations.

This action is upon an "automatic gratuitous insurance," and the action for this particular type of insurance is brought under Section 802 (d) (3) (B), 38 U.S.C., which provides:

> "Any person in the active service who on or after December 7, 1941, and prior to April 20, 1942, has been or shall be captured, besieged, or otherwise isolated by the forces of the enemy of the United States for a period of at least thirty consecutive days and extending beyond April 19, 1942, and at the time of such capture, siege, or isolation by the enemy did not have in force insurance in the aggregate amount of at least $5,000 under the War Risk Insurance Act, as amended, the World War Veterans' Act, 1924, as amended, or this subchapter, shall be deemed to have applied for and to have been granted, effective as of date of such capture, siege, or isolation, National Service Life Insurance in the amount which together with any such insurance then in force shall aggregate $5,000 insurance, and such insurance shall remain in force and premiums on such insurance shall be waived during the period while such person remains so captured, besiged, or isolated, and for six months thereafter: . . ."

The USSAFE serviceman, Priscillano Estil Praido, who was killed while beleaguered on Bataan on April 3, 1942, was such a person deemed to have been issued insurance. The appellant, as person in locos parentis to the serviceman, filed claim for the benefits under such insurance according to Paragraph (5) of the foregoing subsection which provides:

"If any person deemed to have been issued insurance under subsection (d) (3) (A) or (B) of this section die without filing application and within the time limited therefore, death insurance benefits shall be payable in the manner and to the persons as stated in subsection (d) (2): *Provided*, That no application for insurance payments under subsection (d) (2) or (3) of this section, shall be valid unless filed with the Veterans' Administration within *seven years* after the date of death of insured by evidence satisfactory to the administration . . ." (Italics supplied)

The claimant, appellant, filed a claim for the benefits on June 11, 1948, about 10 months within seven years, after death of the insured. The claim was finally denied on January 8, 1958. She brought action on February 24, 1958.

The right of action for this type of insurance benefits is provided by § 817, 38 U.S.C., which provides that suit may be brought upon a claim subject to the same conditions as are applicable to United States Government Life (converted) insurance under the provisions of 38 U.S.C. § 445 and 551. Section § 445 makes the right to maintain a suit dependent upon a "disagreement" between the Veterans' Administration and the claimant, and defines a "disagreement" as a denial of a claim by the Administrator, or someone acting for him, on an appeal to the Administrator. 38 U.S.C. § 445c, enacted for the purpose of "clarifying" § 445, enlarges the definition of "disagreement" to include a denial of a claim by the Administrator *without requiring that the denial be upon an administrative appeal.* It thus appears that a claimant has an option (1) of instituting

ERRATA

APPEELANT'S Main Brief

Page 21, quotation starting at line 19 read: "In a statute referred to are taken."

Page 34, line 17, insert, between "insane persons" and "or persons" the following: "or persons under other legal disability."

suit in the District Court immediately after his claim has been denied or (2) of appealing his case to the Administrator, and if that decision is adverse, of then instituting suit in the District Court. The statute of limitation is suspended during the whole period that the claim is held in the Veterans' Administration. Howard v. United States, 97 F.2d. 987.

"Denial" as used in the statute, signifies something more than an intradepartmental Act or decision to the party making the claim. United States v. Green, (C.A. 6th Tenn.) 84 F.2d. 449

In rejecting a claim, the word "denial" need not specifically be used, if the intent to refuse payment of insurance to the claimant is otherwise evident. Burns v. United States (C.A. 2d N.Y.) 101 F. 2d. 83.

The bringing of this action, being subject to the conditions in §445, 38 U.S.C., incorporated by reference in § 817, 38 U.S.C., "In a statute of specific reference only the appropriate parts of the statute re-

2 Horack's Sutherland on Statutory Construction, 3rd Ed. § 5208;

Panama R. Co., v. Johnson, 264 U.S. 375, 68 L. ed. 748, 44 S. Ct. 391.

Accordingly all the conditions in § 445, except as to that in apparent conflict or could not be reconciled, by the language and meaning therein, with subsection 802 (d) (3) (B) Paragraph (5) are available and govern this action.

A. Said Paragraph (5) *Creates a cause of action dependent upon a "disagreement."*

Since the filing of a claim with the Veterans' Administration and its denial, when a "disagreement" could thereby exist, is a pre-requisite to the federal courts' taking jurisdiction (§ 445, 38 U.S.C.; Leyerly vs. United States, 162 F.2d. 79) when a claimant, therefore, makes a valid application for a claim with the Veterans' Administration within 7 years (e.g. a month, two months, or eleven months), according to Paragraph (5), § 802 (d) (3) (B), 38 U.S.C., this statutory provision then creates expressly a cause of action for such a claim so filed within 7 years and denied by the Veterans' Administration.

A party pursuing a strictly legal remedy cannot be adjudged in the wrong because of any delay on his part if he acts within the time allowed and pursues the method prescribed by the statute.

United States vs. American Bell Teleph. Co., 167 U.S. 224, 42 L.ed. 144, 17 S.Ct. 809.

(1) *(Since) a disagreement is a jurisdictional pre-requisite to the maintenance of a suit on the insurance policy benefits.*

The claimant may sue the United States only as authorized by the provision of § 445, 38 U.S.C., which in pertinent parts provides:

"In the event of disagreement as to the claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the district of Columbia or in the District Court of the United States in

and for the district in which such person or anyone of them resides and jurisdiction is conferred upon such courts to hear and determine all such controversies . . ."

On this point of the said section, the courts are well-settled in their construction as expressed in the case of Leyerly vs. United States, 162 F.2d. 79, in which the court held:

"Construing the foregoing statute (§ 445, 38 U.S.C.) we have pointed out that a suit on a war risk insurance contract is a suit against the Government, and that one of the conditions of its consent to be sued is the existence of a 'disagreement' between the Veterans' Administration and the claimant. In other words a disagreement is a jurisdictional pre-requisite to the maintenance of a suit on the insurance contract. McLaughlin vs. Journey, 10 Cir., 82 F.2d. 772. And a disagreement arises only when a claim has been filed with the Veterans' Administration, and rejected. Wilson vs. United States, 10 Cir., 70 F.2d. 176."

In effect, then, the provision of said Paragraph (5), when a claim has been filed within 7 years, acts as

(2) *Qualifying and stopping the six-year limitation provided in § 445 from operating so that claimant who is prevented, unless there exists a disagreement, from suing can have the full benefit of the time allowed her in which to bring action.*

The AMERICAN JURISPRUDENCE, in 34 AM JUR § 188, it is stated:

"However, the courts give to a law creating an exception the object of which is to prevent the statute from running during the time the claimant is prevented without fault on his part from suing, so that he can have the full benefit of the time allowed him in which to bring his action. Some courts exclude from the operation of the statute of limitations cases in which no action can be brought at all, either for want of parties capable of suing, or because the law prohibits the bringing of the action."

Amy vs. Watertown, 130 U.S. 320, 32 L.ed. 953, 9 S.Ct. 537; United States vs. Wiley, 11 Wall. (U.S.) 508, 20 L.ed. 211; Braun vs. Sauerwein, 10 Wall. (U.S.) 218, 19 L.ed. 895.

In Amy v. Watertown, supra, the court says:

"There is one class of cases which is excluded from the operation of the statute by act of law itself, of which the case in which Mr. Justice Strong made the remark referred to is one. This class embraces those cases in which no action can be brought at all, either for want of parties capable of suing, or because the law prohibits the bringing of an action."

In the case at Bar, the claimant has no way of suing in any court until there has existed a "disagreement" between her and the Veterans' Administration, which "disagreement" could have existed only after she had filed her claim with the Veterans' Administration and was rejected.

The statute of limitation ceases to run against a claimant whose power to institute his suit has been taken away by statute, whether such exception is

contained in the act of limitation or not.
Broadfoot v. Fayettevile, 124 N.C. 478, 32 S.E. 804.

The opinion of the court in the foregoing case has been drawn and supported by the well-settled doctrine established by the United States Supreme Court, quoting authoratively from the cases, as follows:

> "These views are so well expressed in United States v. Wiley, 11 Wall. 508, that we cannot do better than quote a part of the opinion in that case: 'But it is the loss of the ability to sue, rather than the loss of the right, that stops the running of the statute. The inability may arise from a suspension of right, or from the closing of the courts; but, whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitation are, indeed, statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have.' "

The court, referring further to United States Supreme Court decisions, says:

> "These cases were approved in Braun v. Sauerwein, 10 Wall. 218, where it was said: 'Similar decisions . . . have been made in state courts. They all rest on the ground that the creditor has been

disabled to sue by a superior power, without any default of his own; and, therefore, that none of the reasons which induced the enactments of the statutes apply to his case; that, unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue.' "

These views provide structural strength to the opinion more aptly expressed by state supreme courts of states within this circuit district that where laws create special statutory proceedings, as in the case at Bar, the provisions of the general law of limitations are sometimes construed as not applying thereto.

State Medical Examiner Bd., vs. Stewart, 46 Wash. 79, 89 P. 475, 11 L.R.A. (N.S.) 557;

People vs. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435.

(3) *Section 445 was intended to insure the application of the general rule of jurisdiction that administrative remedies must be exhausted before appeal is made to the courts.*

This point has been settled in this Court in United States vs. Densmore (C.C.A. 9th), 58 F.2d. 748, in which this Court says:

"One of the obvious purposes of the legislation with regard to disagreement upon a claim by a veteran is to require the veteran to exhaust his remedies in the department before bringing suit. His right to bring suit is conditioned upon his having done so. The statute provides that the final

decision of any division, bureau, or board in the veterans' administration shall be subject to review on appeal by such administrator. 46 Stat. 1016, ch. 863, section 2 (38 U.S.C.A. § 11a)"

The rest of the Court's opinion is embodied in the opinion of the Court in Simmons vs. United States, 110 F.2d. 296, the Court saying:

". . . The first provision, in Section 445, requiring denial by the Administrator on appeal, 'has for its purpose the establishment of a definite rule that before suit is brought a claimant must make a claim for insurance and prosecute his case on appeal through the appealate agencies of the bureau before he shall have the right to enter suit.' Report of the Senate Finance Committee, set out in United States vs. Densmore, 9 Cir., 1932, 58 F.2d. 748, 750. This section, we take it, was intended to insure the application of the general rule of jurisdiction that administrative remedies must be exhausted before appeal is made to the courts . . . .

"(5-7) Obviously the broader definition of 'disagreement' in Section 445c, supra, did not repeal the earlier provision, nor did it abrogate claimant's right to administrative appeal. The effect of the amendment was, as we have applied it, to start the limitation running again from the time when the claim is denied by one with designated authority. However, if the claimant duly prosecutes his claim through proper administrative appeals, this time would not fall within the six year limitation period; but if no action is in fact taken by the claimant, the mere right to appeal does not prevent or toll the running of the statute of limitations."

(B) *Further, the statutory provision of Paragraph (5), § 802 (d) (3) (B), 38 U.S.C., operates as qualifying and supplying exception to the general rule of limitation, where the general and the specific are in apparent conflict.*

We respectfully submit: Where the legislature has provided a statutory remedy (Paragraph (5), § 802 (d) (3) (B), 38 U.S.C.) which supplants in part a corresponding general statutory remedy (in this case, on the matter of time) § 445, 38 U.S.C., and has incorporated thereto a period of time for filing a valid claim, the denial of which would have given the claimant the right of action, which is different from the time provided in § 445, there is presented the situation of a conflict between the two provisions, and the provision of Paragraph (5), § 802 (d) (3) (B), being specific and the proper section sued under for this type of insurance benefits in question, should prevail.

This principle is long-settled in Anglo-American law. In the case of

Townsend vs. Little, 109 U.S. 504, 512, 3 S.Ct. 357, 27 L.ed. 1012.

"According to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, *the specific qualifying and supplying exceptions to the general, . . .*" (as italicised in Territory of Alaska vs. American Can Company, 246 F.2d 496).

(1) *Rules of construction should give effect*

to legislative intent, one portion of statute should not annul that granted by another.

We further respectfully submit that in incorporating § 445, 38 U.S.C., by reference in § 817, 38 U.S.C., and stating that suit may be brought upon a claim subject to the conditions under the provisions of § 445, Congress did not intend to annul the legal right it has conferred for filing a valid application for a claim in Paragraph (5), § 802 (d) (3) (B), 38 U.S.C. It had not been intended by Congress to allow, on the one hand, the filing of an application valid when filed within 7 years, which necessarily pre-supposes a suit in court dependent upon the rejection of the claim through its final denial upon an administrative appeal, including the suspension of the statute of limitation during the whole period that the claim is held in the Veterans' Administration, and then to take is away with the strict and narrow construction of the six-year limitation in § 445. That would amount to giving a loaf of gratuitous bread with one hand and taking it away from the mouth with the other.

Rather, we maintain, that Congress intended the Court to give the statute some effect, if possible, within the plain meaning and intention of the legislature which enacted Paragraph (5), § 802 (d) (3) (B), 38 U.S.C., according to the well-settled principles of statutory construction, as the Supreme Court observed:

"But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail,

and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

Peck vs. Jenness, 7 How. (U.S.) 612, 623, 12 L.ed. 841, reversing In Re Bellows, Fed. Cas. No. 1, 278, 3 Story 428.

And we further submit as an accepted principle of statutory construction that an act which adopts by reference whole or portion of another statute adopts it not only as it exists at the time of adoption, but also includes subsequent additions or modifications of statute, where legislative intent so to do is clearly expressed or implied. And that the principle is applicable to the statutes in question.

Surich General Acc. And L. Ins. Co., vs. Industrial Com'n, 163 N.E. 466.

So, therefore, appellant's claim for the benefits of automatic gratuitous insurance policy covering the insured serviceman, Priscillano Estil Praido, who was killed in Bataan on April 3, 1942, filed on June 11, 1948, and valid under the provision of Paragraph (5), § 802 (d) (3) (B), 38 U.S.C., and held in the Veterans' Administration until finally rejected, upon administrative appeal, on January 8, 1958, and action brought in the District Court on February 24, 1958, is not barred since the limitation statute was suspended during the whole period that the claim was held in the Veterans' Administration.

Danner vs. United States, (C.A. Iowa), 100 F.2d. 43;

United States vs. Stand, (C.A. 10th Okla.), 102 F.2d. 472.

In the DANNER case, supra, the Court says: "We follow the opinion in the Howard Case, cited supra, and agree with its conclusion that the 'limitation was suspended during the whole period that the claim was held in Veterans' Administration' (Page 989)"

In the Howard vs. United States, 97 F.2d 987, the Court held that

". . . Section 445c extended the definition of the term 'disagreement' to include denial of the claim by any subordinate body of the Veterans' Administration but in no way abrogated the right of appeal to the Administrator, including the right of review by the Board of Veterans' Appeals, nor the suspension of limitation for the period between filing of the claim and its denial by the Administrator. We conclude this

"(1) Because Section 445c itself expressly defines a disagreement as being denial by the Administrator; and

"(2) Because this construction is reinforced by the administrative interpretation of the act.

"Upon the first point appellee's contention that the limitation is not suspended on the appeal to the final body within the administration ignores the fact that Section 445c defines a disagreement not only as a denial by a subordinate agency, but also as denial by the Administrator. The same

jurisdictional prerequisite for suit in the District Court then exists on denial by the final administrative body as on denial by the subordinate body.

"Upon the second point the official body which drafted Section 445c interpreted it after its enactment as if appeal to the final body still suspended the limitation.

"Pursuant to statutory authority, Section 426, Title 38, U.S.C., 38 U.S.C.A. Section 426, the Administrator on September 4, 1934, promulgated certain rules and regulations governing appeals from decisions by Insurance Claims Council. Section 3107 of the rules provided: 'An application for review on appeal filed with any activity of the administration prior to the expiration of one year period will be accepted as having been filed within the time limit.' This rule was not changed after Section 445c was enacted.

"Appellant followed the procedure outlined under these rules and appealed to the Administrator because he wished to exhaust his administrative remedies before resorting to an expensive trial in court. Cf. Fouts v. United States, 5 cir., 67 F 2d 249. . .

". . . In view of our construction of Section 445c, it follows that the limitation was suspended during the whole period that the limitation was suspended during the whole period that the claim was held in the Veterans' Administration, namely, from September 11, 1930, to July 13, 1936, and appellant's action was timely."

Upon the principles set forth and discussed and applied to the facts and the provisions of the statute,

the court should have found that plaintiff-appellant's action is not barred by the statute of limitations, and that it erred in vacating the order of September 29, 1958, denying defendant's motion to dismiss and in granting it as of October 21, 1958. The court was correct, on the first place, and should not have change of heart.

THIRD POINT

The fact of appellant's legal disability by reason of her residence in the Philippines during the hostilities between the United States and Japan, being necessarily implied in, or is reasonably to be inferred from, allegations, is as much part of such pleading as what is expessed and need not be formally alleged. Neither the inference, nor the presumption of law need be pleaded by the plaintiff-appellant. And, as a matter of that, an allegation in the complaint that six years have not elapsed since accrual of the right of action is sufficient, upon the court's construing the provisions of § 445, 38 U.S.C., on the matter of claimant's legal disability, as against defendant's motion to dismiss by reason of the statute of limitations.

Applying the law of the six-year limitation upon the facts of the case at Bar, under the strict construction of the provisions of § 445, 38 U.S.C., we shall come to the same results that appellant's action is not barred by the statute of limitations.

Preliminary considerations

Section 445, 38 U.S.C., incorporated by reference by § 817, 38 U.S.C., authorizing suits against the United States "In the event of disagreement as to

claim. . . under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder," provides, in pertinent part, as follows:

> ". . . no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made; *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded; *Provided further*, that this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. Infants, insane persons, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after removal of their disabilities. . . ."

(A) It has been settled by the United States Supreme Court that residents of the Philippines were persons under legal disabilities during the period of hostilities between the United States and Japan in the case of Soriano vs. United States, 352 U.S. 276, 77 S. Ct. 275, affirming, the Court says:

> "After issuance of the writ in this case, the Court of Claims in Compania Maritima v. United States, ... Ct Cl ....., 145 F Supp 935 (1956), held that a Philippine resident seeking redress against the United States was under a legal disability while hostilities between Japan and the United States continued. The court further held that the claim of such person must be filed within

ERRATA

APPEELANT'S Main Brief

Page 21, quotation starting at line 19 read: "In a statute referred to are taken."

Page 34, line 17, insert, between "insane persons" and "or persons" the following: "or persons under other legal disability,"

three years 'after the disability ceases, i.e. by September 2, 1948."

The appellant is a native of the Philippines and resided in it all her life until she immigrated to the United States in 1957,—a fact particularly within the knowledge of defendant's Immigration And Naturalization Department and the Secretary of State. The fact of her residence and that of her initiating and prosecuting her claim with the defendat's Veterans' Administration offices in Manila and Washington are matters in possession and within knowledge of defendant. The fact of the war with Japan, the Japanese occupation of the Philippines, the surrender of the United States armed forces and the non-existence of United States courts and civil administration are within the knowledge of defendant as well as within judicial knowledge, including the fact that only few Filipinos, that of the president of the Philippine Commonwealth and Hon. Carlos Romulo, ever got out of the Philippines during the war. All material informations concerning the insured are in possession of defendant, and of his relation with appellant. His entry in the armed forces of defendant in the Philippine Islands is contained in the stipulation of the parties. TR—14.

Allegations in appellant's amended complaint contains facts from which could be inferred or implied facts of her residence in the Philippines during the happening of the contingency being sued for and while she was prosecuting her claim with the Veterans' Administration. TR—3-8. Documents referred to or letter referred to in allegations in the amended complaint contains facts of appellant's residence in the Philippinees. TR—6-7; Exhibit A, TR—21.

Paragraph XIII in the amended complaint alleges that "Six years have not elapsed since accrual of the right for which claim is made in this action."

Under the foregoing facts, the question now is: whether appellant need have pleaded formally facts constituting her legal disability for being a resident of the Philippines to raise the matter of legal disability before the trial court for consideration in construing the provisions of § 445, 38 U.S.C., on the government's motion to dismiss by reason of the statute of limitations?

It would seem that the fact of the residence of a native of the Philippines at the time of the hostilities between the United States and Japan need not be formally pleaded where the pleading has averred facts from which the whereabouts of appellant are necessarily implied. What is clearly implied is as much a part of a pleading as what is expressed.

Daniels vs. Tearney, 102 U.S. 415, 26 L. ed. 187;

The view of courts in this jurisdiction seems well settled as tersely expressed in Robinson vs. F. W. Woolworth, 261 P. 253, as follows:

> "Whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken directly averred. Marcellus v. Wright, 51 Mont. 559, 154 P. 714."

In the case of Grant vs. Nihill, 210 P. 914, the court says:

> "It is equally well settled that, as against an attack for lack of substance, and in the absence

of a special demurrer or motion, whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as directly averred."

"It is apparent, of course, that when a specific fact need not be proved by plaintiff, an allegation in that connection is rather an empty formality. And it would seem reasonable, in order to avoid such empty formality, that when facts are pleaded from which the presumption arises, these facts might well be provisionally accepted as true, until denied, so as to give rise to the presumption at that stage. And so it is held, for it is stated in 49 C.J. 39 that 'there need be no direct allegation of fact which is necessarily implied from other averments, and presumptions of law need not be pleaded, even, it has been held, though they are prima facie only." Rosenblum vs. Sun Life Assur. Co. of Canada, 65 P. 2d. 399, 403, 51 Wyo. 195.

The American Jurisprudence, 41 AM. JUR. §10, states:

"A pleading which avers facts from which the laws presumes another fact sufficiently pleads that other fact. What is clearly implied is as much a part of a pleading as what is expressed. Like a presumption of law, an inference need not be pleaded."

Applying the rule that, where facts are pleaded from which an ultimate fact must result, then it is not necessary to specifically plead such fact—

Sawyer Store vs. Mitchell, 62 P. 2d. 342;

Kershaw vs. Merchant's Bank, 40 Am. Dec. 70;

Grant vs. Nihill, 210 P. 914, 64 Mont. 420;

that is, where facts are pleaded from which the ultimate fact of appellant's legal disability must result, then it is not neccessary to specifically plead such fact, and the conclusion is unescapable then that appellant is, by reason of her residence in the Philippines at all times her right of action was in existence, a person under a legal disability.

Allegations in paragraphs VIII, IX, and X, in the amended complaint, referred to claim applications, letters, affidavits which are in the posseession of defendant and which contain facts from which may be drawn the ultimate fact of claimant's legal disability by reason of her residence in the Philippines at the times in question. Whatever then is reasonably to be inferred from such facts are to be taken as directly averred.

> "A fact may appear (from the allegations of a pleading) by inferrence as well as by direct allegation." United Bank & Trust Co. vs. Fidelity & Deposit Co., 204 Cal. 460, 268 P. 907, 909.

We submit, as apt, on this point, the general rule stated in the American Jurisprudenece, 41 AM. JUR. § 86, which is a follows:

All the facts necessary to establish the fact of legal disability of the claimant are peculiarly in the possession of the defendant not only with the administrative agency concerned in this claim but also with the Immigration and Naturalization, the Secretary of State, and the War Department.

Matters within the knowledge of the other party, therefore, may be omitted entirely. Kritzer vs. Lancaster, 214 P. 2d. 407; Brea vs. McGlashan, 39 P. 2d. 877, 3 Cal App. 2d. 454.

In the case of the vessel, The Algie, 56 F. 2d. 388, the court says:

> "There is an old rule of evidence quite apropos here, to the effect that, where evidence is peculiarly within the knowledge and control of one party and it is not produced and no explanation offered as to why it is not produced, it would have been detrimental to the party producing it."

It is the further contention of appellant that as against the government's motion to dismiss, allegation in the amended complaint that "Six years have not elapsed since accrual of the right for which claim is made in this action," is sufficient for the court, in construing the statute of limitations provisions in § 445, 38 U.S.C., to take into account appellant's legal disability from matters alleged in the amended complaint and other facts in the record, together with the historical facts and circumstances of that particular war with Japan without allegations of such facts and read the pleading along with such matters of judicial notice.

"It is settled that facts of which judicial notice is taken need not be pleaded; the courts in the consideration of a pleading will read it as if it contained a statement of all such matters." 41 AM. JUR. § 9.

In re Bowling Green Milling Co., C.C.A. Ky., 132 F.2d. 279;

Dallard vs. McKnight, 209 P.2d. 387, 34 Cal. 2d. 209;

United States ex. rel Altieri vs. Flint, 54 F. Supp. 889;

Arnold vs. Universal Oil Land Co., 114 P.2d. 522.

(B) In any case, "*The rule was established at an early date, and frequently has been reiterated, that the operation of the statute of limitations is suspnded between the citizens of two countries at war, while such war continues, it being declared that the suspension is so absolute that courts of justice will not even grant a commission in an enemy's country.*" 34 AM. JUR. § 243.

Hanger vs. Abbot, 6 Wall. (U.S.) 532, 534;

Capertown vs. Bowyer, 14 Wall. (U.S.) 216, 20 L.ed. 882;

United States vs. Wiley, 11 Wall. (U.S.) 508, 20 L.ed. 211

Ross, Administrator, vs. Jones, 22 Wall. (U.S.) 576, 22 L.ed. 730.

The Philippines were under Japanese enemy occupation after the Bataan battle in which the insured serviceman was killed up to the time of liberation in 1945—facts of history and common knowledge. The accrual of the right of action of claimant arose about that time, on April 3, 1942, on death of insured. The statute of limitations did not run during the progress of the war. The Court in Ross vs. Jones, supra, says:

> "Statute of limitation did not run against suitors having a right to sue in the Federal courts."

The principle underlying the suspension, even though not proivded in the statute, is well expressed in Hanger vs. Abbott, supra, the Court saying:

> "Absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons as to which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law. . . . ."

Since the hostilities ceased on the conclusion of the treaty of Peace with Japan on September 2, 1945, the statute of limitations started to run on this date. Six years from the date of the treaty of peace would have given claimant up to September 2, 1951, to file suit.

Whether under the "legal disability" exception proviso of § 445, in which a claimant has up to September 2, 1948, to file suit upon a claim, or whether up to September 2, 1951, the appellant on filing her claim with the Veterans' Administration on June 11, 1948, had thereby effected the suspension of the statute from then on and up to its final denial by the Veterans' Administration in a letter dated January 8, 1958, (TR—22-23), or on her receipt of it three days later.

> "*Provided further*, that this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affair. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after removal of their disabilities. . . . ." § 445, 38 U.S.C.

If September 2, 1948, would have been the last day for appellant to bring her suit, and, when she filed her claim with the Veterans' Administration on June 11, 1948, the running of the statute of limitation was suspended, she has then 2 months and 22 days left before the period of limitation would have run out. If the statute again begins to run three days after she received the letter of January 8, 1958, she is still within time when she brought action on February 24, 1958, having that 2 months and 22 days left over when the running of the statute was suspended. As a matter of fact appellant has much time layway, since Section 445d provided, as follows:

> "In addition to the suspension of the limitation for the period elapsing between the filing in the Veterans' Administration of the claim under a contract of insurance and the denial thereof by the Administrator of Veterans' Affairs or someone acting in his name, the claimant shall have ninety days from the date of mailing of notice of such denial within which to file suit. . . . Provided, That on and after June 29, 1936, notice of denial of the claim under a contract of insurance by the Administrator of Veterans' Affairs,

or someone acting in his name shall be by registered mail directed to the claimant's last address of record."

We submit, therefore, that the lower court erred in not finding for the plaintiff that, where the amended complaint alleges that six years has not elapsed since accrual of the right for which claim is made in this action and raised for the consideration of the court the matter of her legal disability by reason of her residence in the Philippines during the period of the existence of her right of action, the statute of limitations having been suspended during the period her claim was held in the Veterans' Administration up to January 8, 1958, the action, brought on February 24, 1959, is not barred by the statute.

CONCLUSION

The intent of Congress, in providing for filing a claim for this particular automatic gratuity life insurance benefits with the Veterans' Administration within seven years valid, clearly indicates that a claimant should have a right of action when such claim filed within the seven years is rejected by the administrative agency, since a claimant could not sue at all in any court for a claim until she has prosecuted her claim through the Veterans' Administration. And since on filing such claim with the administrative agency suspends the running of the statute of limitation during the period the claim is held in the Veterans' Administration, a suit brought upon such claim before the unexpired remaining time when the statute was suspended is not barred by the statute of limitations. Otherwise, the evident intent

of Congress in Paragraph (5), § 802 (d) (3) (B), 38 U.S.C., shall be emasculated if not annulled.

The construction of said provision of the statute in conjunction with the conditions provided in § 445, 38 U.S.C., must need piecing together in harmony and giving its manifest purpose a sensible and reasonable effect, the specific qualifying the general as to make them jibe within the language and meaning of the statute.

Courts, have time and again, cautioned against an ironclad construction of Section 445 when such canon of construction would violate an obvious purpose of Congress (March vs. United States, C.C. Va., 97 F.2d. 327). Courts further say that although provisions of sections permitting suits against the government must be strictly complied with, this section (§ 445) should be construed in favor of claimant on question whether it has complied with whenever possible in borderline cases. (Blanton vs. United States, 17 F. Supp. 327). Appellant has complied with the requirements and prosecuted her claim as provided by law. Even as under the six-year provision of § 445, as qualified and limited by the expressed provisions of its exceptions and suspension during the period the claim was held in the Veterans' Administration, appellant's action is not barred.

The Congress, if we may be indulged a bit of recollection, passed the legislation granting automatically gratuitous life insurance policies to its beleaguered fighting men at a time when at the country's time of crisis, it had its back against a wall and its armed forces faced either giving quarters or annihilation. If ever the patriotic glow and warmth may have simmered down in our time of comparative

security, in the Supreme Court abides yet the memory and remembers when it says:

> "Congress through war risk insurance legislation has long sought to protect from financial hardship the surviving families of those who had served under the nation's flag."

United States vs. Henning, 344 U.S. 66, 71, 73 S.Ct. 114, 97 L. ed. 10;

United States vs. Vandver, 232 F. 2d. 398;

Thomas vs. United States, 189 F.2d. 494;

United States vs. Zazove, 334 U.S. 602, 68 S. Ct. 1284, 92 L. ed. 1601.

For the reasons assigned, appellant respectfully pray that this Honorable Court reverse the orders and judgment of the District Court for the district of Arizona, and, if this Court finds that the parties by their pleadings have mutually admitted and submitted as in a stated case the facts set forth in the amended complaint and in the stipulations and that there is no further material fact requiring further trial, to award and grant the relief prayed for in the amended complaint.

Respectfully submitted,
JOSE DEL CASTILLO
Attorney for Plaintiff-Appellant.

Jose del Castillo
Attorney at Law
221 North Church Avenue
Tucson, Arizona